

United States District Court
Southern District of California

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Case No. 10-CR-4246 JM
)
BASAALY SAEED MOALIN,) Wednesday, December 12, 2012
MOHAMAD MOHAMAD MOHAMUD) Telephonic Status Hearing
ISSA DOREH,)
AHMED NASIR TAALIL MOHAMUD,)
)
Defendants.)

Before the Honorable Jeffrey T. Miller
United States District Judge

Official Court Reporter: Debra M. Henson, CSR, RPR
U.S. Courthouse
221 W. Broadway, Suite 5190
San Diego, CA 92101
(619) 238-4538

Record produced by stenographic reporter

1 Appearances

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3 William P. Cole
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4 ASSISTANT U.S. ATTORNEYS
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7 For the Defendants:
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8 Alice Fontier, Esq.
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10 (Mr. M. Mohamud) Linda Moreno, Esq.
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13 (Mr. Doreh) Ahmed Ghappour, Esq.
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15 (Mr. A. Mohamud) Thomas A. Durkin, Esq.
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1 San Diego, California - Wednesday, December 12, 2012

2 (The following telephonic proceedings were in chambers.

3 Defendants' presence was waived.)

4 THE CLERK: Matter number 1 on calendar,
5 10-CR-4246, USA versus Basaaly Saeed, Mohamad Mohamad
6 Mohamud, Issa Doreh, Ahmed Nasir Taalil Mohamud, for a status
7 conference.

8 THE COURT: Good morning, counsel.

9 (Counsel responded.)

10 THE COURT: Okay. May I have the appearances,
11 please, on the record. As Gaby just indicated, each time you
12 speak, we would appreciate it if you could state your name so
13 that the record is absolutely clear.

14 MR. COLE: William Cole for the United States.
15 Also entering an appearance for Caroline Han and Steve Ward
16 for the United States.

17 THE COURT: Thank you.

18 MR. DRATEL: Joshua Dratel for Mr. Moalin. Good
19 afternoon, your Honor -- or good morning.

20 THE COURT: Good morning.

21 MS. MORENO: Linda Moreno on behalf of
22 Mr. Mohamud.

23 THE COURT: Okay. Thank you.

24 MR. GHAPPOUR: Ahmed Ghappour on behalf of Mr. Issa
25 Doreh.

1 THE COURT: Thank you.

2 MR. DURKIN: Tom Durkin on behalf of Ahmed Nasir
3 Taalil Mohamud.

4 THE COURT: Thank you. Okay. I think that would
5 be everyone. Thank you for all being available for this
6 status. I don't plan on discussing anything other than
7 scheduling and incidental matters. I assume that each of the
8 defense attorneys are willing to waive their client's
9 presence on the record; is that correct, counsel?

10 MS. MORENO: On behalf of Mr. Mohamud, yes, your
11 Honor, so waived.

12 MR. DRATEL: For Mr. Moalin, yes, your Honor.

13 MR. GHAPPOUR: As for Mr. Doreh as well.

14 MR. DURKIN: As for Nasir Taalil Mohamud as well.

15 THE COURT: And -- okay. Mr. Ghappour, I don't
16 know that I heard you.

17 MR. GHAPPOUR: Yes, on behalf of Mr. Doreh as well.

18 THE COURT: Okay. Thanks very much. Of course we
19 have a trial date of January 28, we have the dates leading up
20 to that. Just to review that, our date set for motions in
21 limine to be heard would be January 10 at 9 a.m. with motions
22 to be filed by December 20, no later than December 20, and
23 oppositions no later than December 27. If there's a
24 statement of nonopposition, that is, if a particular party's
25 filed a motion to which there is no opposition, then please

1 have -- please state your nonopposition so that no time is
2 spent working up something that doesn't need to be worked up.
3 And, finally, the reply is due by January 3, if there is any
4 reply to be filed with respect to a motion in limine. There
5 are no other motions pending at this point.

6 I am interested, if not concerned, about the pace
7 of the preparation of transcripts following the depositions
8 that were taken in Djibouti. I would like to know when those
9 transcripts would be prepared and ready to be submitted to
10 the Court to work out, to rule upon any issues and/or
11 objections that were raised; I think that's the first order
12 of business I'd like to address. So, Mr. Cole, let me start
13 with you, sir. What are you -- what are your thoughts
14 concerning preparation of deposition transcripts and the
15 like?

16 MR. COLE: Well, your Honor, we sent the recordings
17 to the defense counsel, and our -- our view is that they were
18 going to take care of making the transcripts. These are
19 their witnesses for their case, and so we sent those to them.
20 We offered to agree on spellings if there was -- because the
21 court reporter's going to have a struggle with Somali
22 words -- with spellings; we can all agree on a set of
23 spellings for the transcripts. But we sort of just turned
24 that over to the defense.

25 THE COURT: Okay. You haven't been monitoring that

1 at all I assume then, Mr. Cole; you're just leaving this up
2 to the defense. Is that correct?

3 MR. COLE: Well, we sent them the disks and haven't
4 heard back -- well, let them know that we assumed that they'd
5 be taking care of the transcripts and hadn't heard anything
6 otherwise. So I guess that's where it stands.

7 MR. DRATEL: Your Honor, this is Mr. Dratel. I
8 don't know if Ms. Fontier has joined --

9 MS. MORENO: No, no.

10 MR. DRATEL: -- the conference. No? Okay. Well,
11 we got the -- obviously -- I mean there were two versions of
12 the videos, one of which was complete, one of which was not
13 complete because of a malfunction on one of the cameras for
14 part of a witness. So when we got the complete -- we got the
15 complete one I think two or three days ago, and Ms. Fontier's
16 sent that out already to a transcriber. We were told it
17 would be about a three to five -- three- to five-day process
18 to get them transcribed. So it's conceivable by the end of
19 this week we'll have them and I think certainly by the
20 beginning of next week, and then I think what we should do --
21 I agree with the Court that what we should do is set a
22 schedule for presenting to the Court each side -- essentially
23 a transcript that identifies each of the objections that the
24 parties wish to make. Some of them, just in terms of what
25 happened during the depositions, some of the objections may

1 have been obviated by subsequent questioning. So, for
2 example, if there was a foundation objection, there were
3 attempts to cure those kinds of objections; they may no
4 longer be viable, and it's up to each party I guess to
5 determine that. But the point being is that just looking at
6 the transcript doesn't necessarily tell you where the
7 objections are. I think it's incumbent upon each of the
8 parties to alert the Court as to which they are still
9 interposing and then to provide a basis for the objection and
10 for the other party, to the extent they feel necessary, to
11 provide a basis for opposing the objection for the Court.
12 Some of that could be done in a -- some of them are -- some
13 of these depositions -- some of the objections are repetitive
14 not so much with respect to -- sometimes with each witness,
15 sometimes with a series of witnesses, so some of them could
16 be handled in -- in a basket as opposed to each separate
17 objection I think. I think that's a way to look at it. I
18 don't know if the government agrees with that, but that's the
19 way I've been viewing this.

20 THE COURT: Well, okay. And I assume that the
21 other defense attorneys on the line agree with you, Mr.
22 Dratel. I'm not hearing anything to the contrary. Let me --
23 let me indicate what my past practice has been when it comes
24 to reviewing deposition testimony that will be coming in. I
25 realize that these are videotaped depositions, and so

1 ultimately the -- those parts of the deposition testimony
2 that will come in need to be synced up with the video
3 portions of the corresponding video of a deponent.

4 Mr. Cole, will there -- I know these are not your
5 witnesses and all, but it may be that you're going to be
6 wanting to play some portions of these depositions, and is
7 there an agreed-upon system for displaying what will be
8 played before the jury? For example, do you have -- I don't
9 know if you've even discussed this, but do you have something
10 akin to a Sanctions software program?

11 MR. COLE: We will -- your Honor, we will have a
12 Sanction-based presentation system in the courtroom, and so
13 certainly the equipment will be there. However, we were not
14 planning on syncing all the depositions. I don't know --
15 since these are in English, I don't know if the defense would
16 have to have a scrolling transcript to play them. I don't
17 know if the defense has thought about that or just -- plans
18 just to play excerpts or -- just to play parts of them
19 without a scrolling transcript or if they want to have either
20 a scrolling or hard copy transcript with the video when it
21 plays. We -- I don't know what their intention is in that
22 regard.

23 To the extent that we present -- to the extent that
24 we present our own cross-examination I guess, or parts of our
25 cross-examination, we'll take responsibility for that. I

1 guess we need to work with the defense and talk that through.
2 We don't -- we don't plan on syncing the entire -- the
3 entirety of all 16 hours of depositions just because from a
4 workload standpoint, that would just be an incredible amount
5 of work to sync the transcripts of that -- to that extent.

6 THE COURT: What I was thinking of -- what I was
7 thinking of would be to sync those portions of the transcript
8 that will be ultimately played -- I realize you have 16 hours
9 of depositions, but let's say -- let's say only, ultimately,
10 you know, a quarter of all of that will be played jointly by
11 both sides, so let's say there's four hours ultimately so
12 that the four hours or, if it's any larger period of time,
13 can be identified after objections are ruled upon. The
14 parties know what deposition testimony will be introduced by
15 either side, and then you can have the -- you can have the
16 rolling transcript in your Sanctions-based program presenting
17 that for the jury. And I was assuming that the parties would
18 want to have the corresponding video of the deponent so that
19 the jury could see the deponent actually testifying for
20 the --

21 MR. COLE: Yes, I was -- yes, your Honor. I was
22 assuming that that in fact would be -- the primary evidence
23 would be, of course, in English would be the video, the video
24 and audio; the jury would hear that. And then if a party --
25 if a party desired to have the demonstrative, the scrolling

1 transcript just as demonstrative evidence to help the jury,
2 that they would prepare that and have that ready to go. We
3 certainly will do that for anything we want to present. I
4 just -- my preference would be though that the United States
5 not take responsibility for -- for preparing transcripts or
6 seeking transcripts for something the defense might want to
7 present. They're welcome to use our projector and courtroom
8 presentation, you know, equipment they can plug their laptop
9 into, but I think each side should decide -- video of the
10 audio is the evidence, and if a certain side wants to prepare
11 a demonstrative to go along with it, either scrolling or not,
12 I just would request that both sides be responsible for their
13 own.

14 THE COURT: Well, that's -- sure, ultimately that
15 is what ultimately should happen; the defense shouldn't be
16 responsible for anything the government is doing, and the
17 government shouldn't be, quote, unquote, responsible for
18 anything the defense is doing. I just want to make sure that
19 whatever ultimately is going to be presented be presented
20 seamlessly, that is, after the objections have been ruled
21 upon, and with whatever type of presentation one particular
22 side wants to utilize so that we don't have any breakdown in
23 that part of it and that we don't have any loss of court
24 time, jury time, that we can just keep rolling along, so to
25 speak.

1 MR. COLE: Yes, your Honor.

2 MR. DRATEL: Your Honor?

3 THE COURT: Yes?

4 MR. DRATEL: This is Mr. Dratel again. Couple
5 things. One is we were not anticipating a synced
6 presentation because the video is pretty clear and the
7 translation is there right on the video, so -- and when we've
8 done these -- when I've done these before, it has not been
9 with a -- with a synced presentation. It's not -- and these
10 are not like depositions in the context of a civil case. I
11 think that both parties approached it as direct and cross as
12 you would find at a trial, so I don't know that we're going
13 to be whittling it down so dramatically other than what the
14 objections are to the extent that they're sustained.

15 The other is that -- I agree with Mr. Cole that
16 it's a -- to do the syncing is an extraordinary task here,
17 extraordinarily expensive in a situation where the trip to
18 Djibouti was extraordinarily expensive to begin with, and I
19 just don't know that it's going to be done. But, you know,
20 we were planning to rely on the video just as we have in all
21 the other cases in which I've used, you know, Rule 16
22 depositions, so I don't think that that's going to be an
23 impediment to the jury getting the best evidence or being
24 able to absorb it.

25 THE COURT: Mr. Dratel, let me interrupt for just a

1 moment.

2 MR. DRATEL: Yes.

3 THE COURT: What you just described to me at the
4 beginning of your last statement is fine as far as I'm
5 concerned.

6 MR. DRATEL: Okay.

7 THE COURT: You're going to have the video, and
8 you're going to have the translated portion of the language
9 spoken side by side as the --

10 MR. DRATEL: No, no, it's not side by side, your
11 Honor. It's on the video. We had a translator there. So in
12 other words, just like we'd be in court, a question is asked,
13 it is translated, the witness answers, it's translated back
14 to the party.

15 THE COURT: That's fine as well. That's -- I have
16 know no problem with that type of presentation. I think that
17 would be perfectly appropriate.

18 MR. DRATEL: Thank you.

19 THE COURT: And if the government wants to use
20 something that's a little more sophisticated, then they're
21 certainly able to do so.

22 MR. COLE: And we will -- just to confirm so the
23 defense does know -- we will have a setup there so all
24 they'll need to do is have what they want to play on their
25 laptop and that they can plug in. So they don't have to

1 worry about bringing a second set of projectors or -- or
2 anything like that.

3 MR. DRATEL: We appreciate that.

4 THE COURT: Okay. In terms of objections, working
5 out any issues that need to be worked out for the
6 depositions, the way I have done it in the past is for the
7 parties to submit a deposition transcript to me and with each
8 party submitting a list of objected-to testimony. So you'd
9 have basically two columns. In the first column you'd have
10 the page and line numbers of the objected-to testimony, and
11 in the second column, you would have the objection or
12 objections to that particular excerpt of testimony. And at
13 the same time, I think that if you could color code the
14 testimony that is in issue, that would be appreciated as
15 well.

16 The way I've done it in the past, I have
17 basically -- I'm working with one transcript and three
18 different color codes. You might use green, for example, for
19 that testimony that both sides agree should be -- should be
20 read to the jury and which will be read to the jury. I would
21 appreciate it if you can reduce that down. I don't know that
22 it's -- you may want more than four hours, but you may not
23 want 16; you know what I'm saying?

24 MR. COLE: Correct.

25 THE COURT: So where it can be efficiently reduced,

1 then it should be reduced. And what both sides are proposing
2 or not objecting to which is going to be read can be
3 highlighted in green, and then pick your respective colors
4 for any other deposition testimony which is going to be
5 advanced by one side with the other side objecting to that
6 deposition testimony. That more or less assists me in going
7 through the transcripts and correlating the written words
8 with the lists of objections that you're going to be
9 submitting to me basically on separate -- in separate
10 pleadings. I think that's a pretty good -- that's worked
11 well in the past. I'm open to any other suggestions the
12 parties would have, but that would be my initial
13 recommendation.

14 MR. COLE: So, your Honor -- this is William Cole.
15 Just to make sure I understand, I think this actually could
16 be really efficient if I'm tracking. Basically we submit to
17 you -- because we cooperated in advance in marking up -- you
18 basically get one transcript that incorporates everybody's
19 position. You have -- you have -- we all have -- instead of
20 getting two sets, you're getting one set that's color-coded
21 with both our positions.

22 THE COURT: Yes, exactly.

23 MR. COLE: Okay.

24 THE COURT: Yes. I just need one set of
25 transcripts with three different color codes.

1 MR. COLE: Okay.

2 THE COURT: And, once again, you know, highlighted
3 in green or whatever other color you want, but in any event,
4 highlighted in green that's going to be played before the
5 jury without objection; then just for example, what's
6 highlighted in orange is what is proposed by the -- by the
7 government which may be objected to by the defense;
8 highlighted in blue is what's going to be -- what's proposed
9 by the defense which is objected to by the government. So I
10 can just -- I can just go right through the deposition
11 transcripts and be making my rulings on the -- right next to
12 the -- you know, on the pleadings, on my copies of the same
13 objection pleadings that have been filed.

14 MR. COLE: Okay.

15 THE COURT: Okay? And I think it would be
16 important to do that before the beginning of the trial so
17 that everybody is aware of what may or may not come in for
18 purposes of making your own opening statements.

19 MR. DRATEL: Certainly, your Honor.

20 THE COURT: So that's what I would suggest. If
21 that's agreeable, then let's -- let's agree that that is the
22 system that we will use.

23 I am -- I would like to talk about timing a little
24 bit here, when I might expect to get these transcripts. Mr.
25 Dratel, you indicated that the tapes are going to be received

1 back by defense counsel next week, so obviously we're looking
2 at the week of the 17th. And you're going to need a little
3 time to figure out what you want to -- what you want to play,
4 and the government's going to need to know what it's going to
5 play. How much time would you like to more or less decide
6 what testimony is going to be proffered in totality?

7 MR. DRATEL: Well, I think that we will need --
8 given the fact that we will have to review the transcripts,
9 go through it, make a decision for each -- obviously each
10 defendant to weigh in on it, each counsel, then for the
11 government to do the same thing, and to then confer with the
12 government and try to determine which areas we agree on; and
13 I think that -- it's more than just exchanging pieces because
14 there may be some negotiation there and some ways that we can
15 trade off some things because that's usually how it's done --
16 I think we'd need a little bit of time for that. So looking
17 at it that way, I would -- it's perhaps a little ambitious,
18 but I think we should try to shoot for that first week of
19 January so that by the time we appear before you on the 10th,
20 you have what we've produced.

21 THE COURT: Well, that would be optimum. I was
22 looking at the date of Thursday, January 10. And if we can
23 not only address the motions in limine at that date but also
24 get into the deposition testimony and resolve objections to
25 the deposition testimony, that would -- that would be very,

1 very good.

2 MR. DRATEL: So we'll shoot for that, your Honor.

3 MR. COLE: Does that mean -- does that mean
4 shooting for giving you that on the 10th or -- I just want to
5 make sure I know what we're shooting for. I think there's no
6 problem -- I foresee us being able to get it all done in an
7 efficient way and to you by the 10th. Getting it to you much
8 before the 10th may be difficult only because we're preparing
9 the motion in limines and responses and replies and it's over
10 the Christmas -- it's over the break --

11 MR. DRATEL: Yes.

12 MR. COLE: -- and so -- not that all of us are
13 planning on taking a lot of break probably because of the
14 trial coming up, but if we had this to give to you on the
15 10th, is that -- that's still 18 days before trial -- would
16 that be sufficient, your Honor?

17 THE COURT: Yes, it would be.

18 MR. COLE: Okay.

19 THE COURT: It would be.

20 MR. COLE: All right.

21 THE COURT: As soon as we get it resolved, the
22 better. And if there was going to be agreement that you
23 could get everything to me by the -- well, before the 10th so
24 that we could address these things on the 10th, all the
25 better, but certainly we have time between the 10th and the

1 28th, the start date for the trial, so --

2 MR. DRATEL: And we'll try.

3 MR. COLE: Okay.

4 THE COURT: Yeah, let's -- why don't you get
5 everything to me by the 10th, and then on the 10th we can
6 schedule a further date or a further approach to getting
7 resolution on the objections to deposition testimony, okay?

8 MR. COLE: Yes.

9 THE COURT: All right. We'll discuss that on the
10 10th then; that will be one of the things we'll address on
11 January 10. Okay. Anything else with respect to the
12 preparation of transcripts or how deposition testimony will
13 be presented that we haven't already discussed?

14 MR. DURKIN: Judge, this is Durkin. I just had one
15 question that came to my mind in terms of bringing in
16 laptops. I'm not familiar with your courthouse procedures.
17 Do we need an order to bring in a laptop or can you bring it
18 in without --

19 THE COURT: Well, you'll need an initial --
20 Mr. Durkin, both sides will need an initial order that will
21 be good for the entire duration of the trial. So anything --
22 yeah, just a down-and-dirty order listing whatever equipment
23 you want to be able to use during the course of the trial
24 will be fine. Give it to me, I'll sign off on it, and that
25 will serve for the entirety of the case.

1 MR. DURKIN: Good. Thank you.

2 THE COURT: Okay.

3 MR. COLE: Your Honor, on the topic of -- and I
4 don't think it would be really necessary to be addressed now,
5 but on the topic of -- since we're talking about transcripts
6 and whatnot -- the United States will be either using some
7 transcripts of the foreign language audio calls -- and
8 there'll be a lot of transcripts, and there will be English
9 translations -- not just transcripts but English
10 translations. And so we right now anticipate using a
11 courtroom presentation system to scroll those transcripts,
12 but also we'll be requesting to provide binders to the jurors
13 if there are jurors who prefer to read it on a piece of paper
14 instead of trying to look at a screen. Some jurors have
15 difficulty following a screen because of their eyesight or
16 otherwise.

17 THE COURT: Yes.

18 MR. COLE: And so that's how we plan to deal with
19 the English translations of the audio calls right now is
20 individual juror binders, and they either will look at that
21 or they'll look at a screen.

22 THE COURT: Well, I've done that -- I've done that
23 in the past; I've allowed the binders or the English version
24 transcripts in the past. You're correct, some people look at
25 the screen, other people use the binders, but of course the

1 jury is told that the translations, the paper translations,
2 will be collected from them right after the presentation of
3 the testimony and will not be available for them the during
4 deliberations.

5 MR. COLE: Okay. On that last point we may --
6 because these are -- because the evidence -- because these
7 are foreign language rather than English -- I know if it's
8 English, the transcripts is just a demonstrative, but the --
9 when they're a foreign language and they're translated into
10 English, I believe the transcript is the evidence. And I
11 know the Court doesn't have to send them back, but I also
12 know under Ninth Circuit law the Court has -- definitely has
13 the discretion to send them back. So we may -- we may brief
14 that for the Court to consider, you know, closer to trial,
15 either with the in limines or the trial memo.

16 THE COURT: Well, anything the -- anything the
17 parties can agree upon obviously I'm going to consider
18 favorably. When you're saying that with a foreign language,
19 the transcript is actually the evidence, I don't know that
20 I'd agree with that entirely. I think the translation is the
21 evidence; the transcript is something that can assist --

22 MR. COLE: Okay. Right.

23 THE COURT: -- in following the translation, so I
24 don't know that it has any different characteristics than an
25 English -- transcript of the English being spoken. But we

1 can -- if that becomes a concern, we can certainly address
2 that at the appropriate time. And I know -- I know the Court
3 has discretion in this area, and I also know that there are
4 some instructions that need to be provided to the jury
5 depending upon what, if anything, is going to go in with
6 them.

7 MR. COLE: Okay.

8 THE COURT: Okay? All right. Good. All right.
9 So anything else on -- anything else on, first of all, on the
10 depositions? That was the initial topic we were discussing.
11 Anything else on the depositions that we need to address at
12 this point? Apparently -- I'm not hearing any further
13 concerns. This may not be the last word, I'm aware of that,
14 and of course I'm aware that rulings need to be made.

15 With respect to the translations of foreign
16 language testimony, I'm assuming that the parties are working
17 together to resolve any questions about translation. Mr.
18 Cole, you want to start off on that one?

19 MR. COLE: I think there's a lot of work to be done
20 there. I think the parties -- that's the intention of all
21 the parties, but I don't think I can say that a lot of
22 progress has been made. They have -- the defense has
23 provided us with one transcript. I know they're working on
24 some others. And when I say one transcript, they provided us
25 with a complete transcript of one audio call. I think the

1 lion's share of the work of seeing if there's any
2 disagreements about our transcripts is still sort of
3 outstanding. We're ready to work through that with the
4 defense whenever they desire.

5 THE COURT: Well, that needs to be resolved and
6 just as soon as possible. I'm assuming that there won't be
7 significant issues with that, but if there are issues that do
8 develop, then what -- what are you contemplating by way of a
9 method to resolve those issues? And also what do you
10 anticipate your timing would be?

11 MR. COLE: Well, we -- you know, I don't want to --
12 the defense has had a lot going with these depositions, so
13 I'm not trying to put this on them or complain because I know
14 they've been juggling a lot of things, but we've been --
15 we've been trying to move this issue along. We've given them
16 the transcripts and, you know, it had -- it's had transcripts
17 for quite a while. We've been asking to engage on that
18 topic. I think they've just been -- I think the depositions
19 took a lot of wind out of their sails, just is a lot of work
20 for them, and so I think they -- we're hoping now that
21 everyone's back that we will start engaging more.

22 We just don't have -- we want to resolve it all as
23 much as we can and limit any dispute over the transcripts
24 down to the very least amount possible, but we just
25 haven't -- we haven't heard back other than the one

1 transcript they gave us that does differ from ours. We're
2 hoping to resolve it all with the defense amicably with just
3 stipulation to transcripts to the greatest extent possible.
4 If we narrow it down to things we can't stipulate on or we
5 can't agree on, I believe we just have to -- everyone's just
6 going to have to bring in their witnesses, their linguists,
7 and the jury will have to decide who they want to believe
8 because I don't know that there is a way -- I don't know that
9 there is a way to resolve it absent an agreement without both
10 sides bringing in their linguists as experts to testify to
11 the meaning of the calls. But if there is another way, we're
12 open to hearing about that.

13 THE COURT: Mr. Dratel?

14 MR. DRATEL: Well --

15 THE COURT: I'm asking you to speak because you
16 seem to have taken the laboring oar, so I think -- you've
17 taken a step forward in volunteering on behalf of the --

18 MR. DRATEL: Not a problem, your Honor. We are --
19 Mr. Cole is correct. Obviously we've invested a tremendous
20 amount of time in the depositions, and what we are trying to
21 do is -- we send out transcripts to our interpreters and we
22 get them back and we look for differences and we try to
23 determine whether they're material, and then we -- we're in
24 the process of doing that. We have a bunch of transcripts
25 that I'm hoping will be ready to send to the government as

1 soon as we can all agree on what -- and part of it is having
2 four different defendants, and so rather than do it
3 piecemeal, we try to do it by consensus so that we each can
4 agree which are the ones that we're going to present to the
5 government as material differences that require some
6 negotiate or decision, and we are still in the process of
7 doing that, although we keep getting them on a rolling basis.
8 So hopefully we'll be able to do that quickly.

9 Ms. Fontier is also probably closer to the ground
10 on that, and I think also someone from Mr. Durkin's office as
11 well who's not on the call right now but has also been
12 handling that on a more hands-on basis. So -- but we will
13 endeavor to do that. I understand the issue, and -- I mean I
14 understand the Court's concern about getting that resolved as
15 quickly as possible so that everything's in order when we get
16 rolling for the trial itself and for the Court to make
17 decisions, if the Court has to make decisions, or whether
18 we're going to have competing translator -- I mean I don't
19 know if this Court has decisions to make in terms of what's
20 right or wrong, that's really a question for interpreters,
21 and we may have, as Mr. Cole said, competing interpreters on
22 the witness stand, and we're trying to reduce that to the
23 minimum possible.

24 THE COURT: Well, it certainly is an issue I think
25 that needs to be addressed just as quickly as possible. I

1 know that the defense has had what the government has
2 identified as pertinent intercepts, conversations, for well
3 over a year, probably closer to two years, and -- and so the
4 defense has been aware of what the government deems as
5 important, and it's probably pretty obvious too, going
6 through some of these intercepts, as to which are pertinent,
7 to use the term the government used in the past, and which
8 are not. So it really does behoove the defense to -- to get
9 this process done just as quickly as possible so at least you
10 know what you're dealing with, you know what the translations
11 are going to be and whether you're going to need the Court to
12 intervene, which may not be the appropriate way to do it, as
13 you both have pointed out, or whether you're going to gird
14 your loins and be calling your individual linguists. That's
15 something you need to know. I hope that doesn't derail the
16 trial at this particular point in time, but I certainly -- my
17 level of concern is certainly pretty high right now.

18 MR. COLE: Yes.

19 MR. DRATEL: And, your Honor -- this is Mr. Dratel
20 again -- I don't think it's going to derail the trial; I
21 don't mean to suggest that at all. Also just in terms of
22 while we've had the conversations for a period of time, we
23 have gotten verbatims over time. So, in other words, you
24 know, the government's verbatim versions have not been with
25 us quite as long as -- not nearly as long as the

1 conversations themselves. Also, our linguists have had dual
2 responsibility, one of which is trying to find calls that the
3 government does not think are pertinent that may be relevant
4 for us to introduce, and we need to build those from scratch
5 and at the same time also review the government's verbatim.
6 And then, as the Court knows and as we've told the Court, you
7 know, finding a stable of qualified translators in this
8 particular instance has been very difficult, so we are
9 working with the people who are available, and that -- well,
10 we have quite a bit of work load, but we're trying to do it
11 as fast as we can.

12 We understand the need to get this resolved, and I
13 know from prior experience that many times these things can
14 be resolved, and we can try to whittle it down to as few
15 disagreements as possible, if any. The goal is obviously not
16 to have any, but I can't promise one way or another because
17 I'm not the linguist.

18 THE COURT: Sure, I understand that. But, you
19 know, you raise an interesting point, Mr. Dratel. You're
20 having your experts go through some of the conversations to
21 see if you can build your own inventory of conversations that
22 you need to have translated, so to that extent I assume that
23 you're going to be in a position to identify for the
24 government which conversations those might be so that they
25 can agree to a particular translation -- they may object on

1 materiality, but at least they can agree as to the accuracy
2 of what's being proposed. Is that what you were
3 contemplating here?

4 MR. DRATEL: Oh, absolutely, your Honor --

5 THE COURT: Okay.

6 MR. DRATEL: -- because we don't want to -- we
7 don't want to have a situation where all of a sudden we're
8 presenting a transcript and the government has to go back and
9 look at it, get somebody to review whether or not, you know,
10 it's accurate and whether they agree to the translation.

11 THE COURT: Right. Mr. Cole, do you -- of all of
12 the hundreds and hundreds of intercepts that have been
13 provided to the defense, I know the government sees only a
14 fraction of those as material. But beyond that, have you
15 identified for yourselves those conversations, a discrete
16 number of conversations you will actually be utilizing during
17 the course of the trial, and if so --

18 MR. COLE: Yes.

19 THE COURT: -- have you provided that list to the
20 defense?

21 MR. COLE: We have in this way -- and I'm going to
22 ask Ms. Han -- Ms. Han, are you still on the line? Maybe
23 she's not on the line.

24 MS. HAN: Yes.

25 MR. COLE: Oh, she is. She may know the actual

1 number. What we did was we turned over -- I want to say --
2 they've had verbatims from us for a long time, but we turned
3 over kind of a quote, unquote, final set of verbatims to them
4 that had minor tweaks -- spelling corrections or, you know,
5 formatting, typographical issues generally -- we turned that
6 set over -- Ms. Han, do you remember when that went over?

7 MS. HAN: Think it was October.

8 MR. COLE: October? And so that set -- that set
9 that we turned -- the reason I bring that set up is because
10 that set is -- we don't -- that set in addition is our
11 case-in-chief phone calls, and we're hoping to cut those down
12 even more, so --

13 THE COURT: Okay.

14 MR. COLE: -- they have a set that is our
15 case-in-chief calls. It's even slightly overinclusive.
16 We're going to make a final cut over the next week or two --
17 when I say final, I mean of course things can always change
18 because of witness testimony or events that happen during
19 trial -- but essentially they'll have -- it will be very
20 clear to everybody the only calls that we're, at least as we
21 head into trial, planning to play in our case-in-chief.

22 THE COURT: How many case-in-chief calls do you
23 think you have?

24 MR. COLE: Ms. Han, do you recall the number right
25 now?

1 MS. HAN: Your Honor, I believe that the number is
2 112 that we whittled the pertinent calls down to, from
3 approximately I think the 130 range down to 112.

4 MR. COLE: And when we say play the calls, we're
5 not going to play whole calls of course, and we're going to
6 whittle it down below 112. So that is the outside, the kind
7 of approximate outside number, but we're hoping to get it
8 below a hundred as we continue to look at the calls. And
9 we're playing just clips from the calls. They got the whole
10 transcript, but of course not -- we're not going to subject
11 everybody, including the jurors, to 100 complete audio calls.

12 THE COURT: Yeah. And you say -- you say the
13 verbatim transcripts for those case-in-chief calls will be --
14 have already been provided to the defense, Mr. Cole?

15 MR. COLE: Yes.

16 THE COURT: Okay. Very good. Well, that's
17 significant headway. And from what I'm hearing, the defense
18 is going to provide to the government verbatim transcripts of
19 any calls it may deem pertinent as it's building some kind of
20 an inventory for its defense; is that correct, Mr. Dratel?

21 MR. DRATEL: Yes, your Honor.

22 THE COURT: Okay. Well, good. All right.

23 MR. DRATEL: And also, your Honor, just so there's
24 no confusion, the government may be playing some clips; we
25 may be looking to put other parts of it in under Rule 106 or

1 other basis, you know, for these particular calls.

2 THE COURT: Sure, I understand.

3 MR. DRATEL: But we know what -- we know what parts
4 they want to put in, so we'll be prepared to do that.

5 THE COURT: Okay. Very, very good. And I assume
6 that you have -- well, if you want to -- if you want to get
7 other parts of the conversation in under Rule 106, I assume
8 you already have -- those other parts were included in the
9 verbatim translations; am I correct in that assumption?

10 MR. COLE: Let me tell you, your Honor, what we did
11 is when we turned over our verbatim translations, those
12 verbatim translations are sometimes of an entire call if it
13 was a short phone call. Sometimes those are only
14 translations of the parts -- of parts of the call because the
15 phone call might go on for a very long period of time, and
16 we're conserving translation resources and we only translated
17 chunks of the call into a written transcript.

18 That said, even within the verbatim portion that we
19 have provided them -- let's say we provided them a part of a
20 phone call. We will only be playing a clip from that part
21 typically, and so if you look at the total volume of
22 transcripts we provided to them as the case-in-chief
23 transcripts, they're mostly partial verbatims, and even of
24 those partials, we're not planning on playing all of it.

25 THE COURT: Okay. Well, I -- yes, I understand

1 that you're -- in some cases you may be wanting to play a
2 clip of a part or a part of a clip, but --

3 MR. COLE: Right, right.

4 THE COURT: -- in any event, it's a small piece of
5 what has already been provided in the form of a verbatim
6 translation to the other side. But to the extent that what
7 the defense may want to play, either the clip of the part or
8 the part of the clip that wasn't played, which may not be
9 translated, then I think that needs to be -- from what I'm
10 hearing, the defense is going to get a translation of that
11 just as soon as possible and over to the government so that
12 you know whether or not you have an issue that needs to be
13 resolved there. I think that's what I'm hearing, okay?

14 MR. COLE: Yes.

15 MR. DRATEL: And right, your Honor. And some of
16 these transcripts, by the way, that we're building are parts
17 of the calls that the government is going to introduce but
18 not the whole call, and we may want another part of those --
19 of those calls.

20 THE COURT: Okay. Well, obviously there's work
21 that needs to be done in this whole area of translations --
22 well, depositions and then translations of calls that you
23 need to address, but --

24 MR. COLE: Yes.

25 THE COURT: -- I'm glad to hear what I've heard

1 this morning, that things really do seem to be on track. I
2 know both sides are cooperating very nicely, and that
3 certainly took place for the Djibouti depositions to go
4 forward, and I appreciate the cooperation that you're
5 extending to one another to this point as well.

6 Jencks. Mr. Cole, Mr. Dratel, we should probably
7 raise the subject of Jencks as soon as possible. You know,
8 Jencks should be going over, it should be going over with --
9 in advance of trial obviously, and so I'd be interested in
10 your thoughts there. Mr. Cole, what are you thinking?

11 MR. COLE: Yes. We will provide our Jencks in
12 advance of trial, and we have already produced a lot of
13 Jencks -- well, I shouldn't say a lot because there really
14 isn't that -- this is -- as you probably already heard from
15 our prior discussion or figured out from the discussion we
16 just had, this is a bit of an unusual trial because
17 90 percent of the volume of the time of the trial's going to
18 be recordings, and -- which is interesting, not usually the
19 case, but really the bulk of the evidence is going to be a
20 lot of either recorded audio calls or recorded deposition.

21 But that said, we have been producing Jencks to the
22 extent we have it, and we will be continuing to produce
23 Jencks well in advance of trial. We should have -- we should
24 have Jencks, lingering Jencks -- unless we find new things,
25 we should have lingering -- any lingering Jencks to the

1 defense certainly by the time of the motion in limine hearing
2 and probably much before that, by the end of the year.

3 THE COURT: Okay. Mr. Dratel, any thoughts there?

4 MR. DRATEL: So if I'm right, that the government
5 expects to produce the Jencks by the end of the year or at
6 least by the 10th of January; is that what I'm hearing?

7 MR. COLE: Yes.

8 MR. DRATEL: Okay. Okay.

9 THE COURT: All right. What I'll do is this then.
10 I think you have an agreement that Jencks is to be produced
11 as soon as practicable, clearly understanding there's a lot
12 of work that remains to be done, but in any event no later
13 than Thursday, January 10. I'll take your agreement, what
14 seemed to be a general agreement, and adopt it as an order of
15 the Court. So that would be the order, Mr. Cole, that Jencks
16 is -- lingering Jencks, as you put it, is to be produced no
17 later than Thursday, January 10 unless otherwise ordered by
18 the Court. Is that acceptable, counsel?

19 MR. COLE: Yes. And let me just, your Honor -- let
20 me just ask Mr. Ward and Ms. Han to chime in if they -- if
21 I'm missing something on that score that they want to bring
22 to the Court's attention. Is that date acceptable from their
23 standpoint?

24 MS. HAN: Yes, your Honor.

25 MR. WARD: This is Mr. Ward, your Honor. That's --

1 that's a good date for us.

2 THE COURT: Okay. Very good. Well, I think I've
3 pretty much exhausted the primary areas I wanted to address,
4 and, Mr. Cole, anything further before we wrap things up for
5 today?

6 MR. COLE: No. I think you really hit all the very
7 important things that are time-consuming and we really need
8 to focus on, so I don't have anything else.

9 THE COURT: Mr. Dratel, anything else on behalf of
10 the defense community?

11 MR. DRATEL: No, your Honor, but if anybody --

12 MS. MORENO: Yes.

13 MR. DRATEL: -- else has --

14 MS. MORENO: Yes.

15 MR. DRATEL: -- they should chime in.

16 MS. MORENO: Yes. Hello, this is Linda Moreno on
17 behalf of Mr. Mohamud.

18 THE COURT: Yes. Hello. I'm not hearing you, Ms.
19 Moreno.

20 MS. MORENO: Okay. I can hear you now. Thank you,
21 your Honor. Just one scheduling question, your Honor. Does
22 the Court sit on Friday in trial or will we have the Fridays
23 off during this trial?

24 THE COURT: Well, good question. I typically hold
25 my criminal calendars -- I have my criminal calendars on

1 Fridays, but they're not every Friday. Generally speaking --
2 and you'll be given a schedule in advance -- but generally
3 speaking, I have my criminal calendars on the first and third
4 Fridays of the month. If there is a fifth Friday on a month,
5 then I'll hold a criminal calendar on the fifth Friday of a
6 month as well.

7 Typically I do overflow calendars, that is, any
8 overflow items that need to be addressed or special set
9 matters, on a Monday. But what I think I'd probably end up
10 doing is forgoing that option, that is, the Monday overflow,
11 and then just limiting my calendars to every other Friday
12 beginning with the first Friday of a month. So it would be
13 the first and third and any fifth Friday of the month, so
14 your second and fourth Fridays of a month would be open.

15 Now, that said, I know that you're not anticipating
16 this case to be excessively lengthy. We're looking at
17 February. Obviously we're going to start on the 28th,
18 Monday, the 28th, with the trial, with preliminaries and then
19 getting jury selection underway, so the first Friday would be
20 February 1st. I would have a calendar on the 1st, I would
21 have a calendar on the 15th.

22 I think everybody is probably anticipating that the
23 case would be to the jury by the end of February, but if not,
24 then my next calendar would be on Friday, March 1st, which
25 would be a day for deliberations if the jury has the case,

1 but if the jury doesn't have the case, we would be dark for
2 the trial because we wouldn't be done with the evidence.

3 MS. MORENO: Thank you, your Honor.

4 THE COURT: What's your estimate? What's your --
5 anybody have any thoughts on any refined estimates for the
6 length of trial?

7 MS. MORENO: Well, your Honor, after -- again, this
8 is Linda Moreno -- including now in the consideration of an
9 estimate, taking into account the depositions and the
10 recordings that Mr. Cole has indicated will be 90 percent of
11 trial, I do believe that we'll be working most of the month
12 of February if not the entire month.

13 THE COURT: I think initially --

14 MR. COLE: I think -- I'm sorry.

15 THE COURT: Go ahead, Mr. Cole, please.

16 MR. COLE: I guess you never know. I'll be
17 surprised if that's the case just particularly because of the
18 depositions; I actually think the depositions make this all
19 shorter in a way. They are what they are. Soup to nuts, I
20 think it was 16 hours. That would be two days or two and a
21 half to three days of court at most for all those witnesses.
22 Our recordings -- I don't know because I don't know what the
23 defense case will be. I certainly know that our -- the
24 government still believes that its case-in-chief will be --
25 if we start on the 28th, we don't see how our case-in-chief

1 would last more than two weeks, and I think it will be done
2 more like in a week and a half, our case-in-chief, but two
3 weeks at the outside if cross-examination, you know, takes up
4 more time.

5 THE COURT: Okay. Well, I think your last estimate
6 was about two weeks for the government's case, perhaps a week
7 for the defense case; I think you were looking at three
8 weeks. I can't recall whether that included jury selection
9 or not. We'll probably take a couple of -- the better part
10 of a day -- well, I think it will take at least a full day
11 for jury selection, so we may well go into the second day
12 just in wrapping up -- wrapping up the jury and handling some
13 other preliminary matters.

14 MS. MORENO: Your Honor, if I may with respect to
15 jury selection, which was my second issue I was going to
16 raise with the Court, that -- I'm going to be sending Mr.
17 Cole a proposed draft of a short questionnaire that I will be
18 requesting and filing on the 20th along with the motions in
19 limine. The questionnaire may also be helpful in shortening
20 the selection process. But the Court has been referring to
21 the December 20 date strictly as a motion in limine, and I
22 wanted to alert the Court that it was my intent to file a
23 request for a short questionnaire.

24 THE COURT: I think that's perfectly appropriate.
25 If in fact you're -- any additional filings -- I was going to

1 take care of a number of matters when we meet on the 10th of
2 January, including jury instructions and other preliminary
3 administrative matters, but if you're desiring to submit a
4 proposed jury written questionnaire, then you may certainly
5 do so, and there's no reason why you could not file it when
6 you're filing your motions in limine, that being in no later
7 than December 20.

8 I will tell you that I've used questionnaires just
9 a few times in the past, and, you know, there are arguments
10 for and arguments against the use of questionnaires, we don't
11 need to go into that right now, but any proposed
12 questionnaire I would suggest should be filed no later than
13 December 20. And make it as brief as possible; your chances
14 of it being utilized are probably better. The logistics of
15 getting proposed questionnaires to jurors, responded to,
16 collated, copies made, all of that is something that
17 typically the Court does, and there's a tremendous amount of
18 work involved in that behind-the-scenes effort. So if we're
19 going to use one, which I'm not -- I'm not wedded to at this
20 point, but if we're going to use one, making it shorter
21 certainly enhances the chances of it being used. Anything
22 else?

23 MS. MORENO: Well, certainly, your Honor. That
24 would be my intent.

25 THE COURT: Anything else, Ms. Moreno?

1 MS. MORENO: Not with respect to that, no, your
2 Honor.

3 THE COURT: Okay. Mr. Durkin, anything else from
4 you, sir?

5 MR. DURKIN: No, Judge.

6 THE COURT: All right. Mr. Ghappour?

7 MR. GHAPPOUR: Actually, Judge, I was wondering
8 about -- with respect to other motions such as a bill of
9 particulars, would that also be due with the in-limine
10 motions to be heard on the same day?

11 THE COURT: Well, that's -- those are pretrial
12 motions. A bill of particulars is a pretrial motion; it's
13 not a motion in limine. And we should -- we should have been
14 beyond that point at this time. I don't know -- I don't know
15 what you could put in a bill of particulars at this point
16 that would provide further information about the case for
17 you.

18 MR. GHAPPOUR: Well --

19 THE COURT: I wasn't -- it wasn't my intention to
20 address that at this point. I would suggest -- and I've said
21 this, tried to emphasize it in the past -- that if you have
22 a -- if you have a motion, you're considering a motion that
23 is not a motion in limine, that you deal with it as a
24 pretrial motion and secure a hearing date for that, working
25 through chambers so that a briefing schedule can be set up.

1 I'm not against using the schedule you have now for something
2 like a bill of particulars -- I mean that's not a
3 particularly complex motion, but I'm concerned about opening
4 up general motion practice at this point, Mr. Ghappour.

5 MR. GHAPPOUR: Well, your Honor, it's just there
6 was an outstanding bill of particulars that wasn't ruled. In
7 addition, the indictment was superseded, and if you recall, I
8 actually did file a bill of particulars within the week after
9 the superseded. And my understanding was that we were going
10 to hear them later --

11 THE COURT: Well --

12 MR. GHAPPOUR: -- and that's the last --

13 THE COURT: -- that's fair. It's my understanding
14 that there was nothing outstanding at this point, but if
15 there is an outstanding motion that's been fully briefed,
16 then we will -- we will address it on January 10, the date
17 set for motions in limine. I just don't want to derail the
18 trial date at this point. And if you're satisfied with the
19 state of the pleadings on that, then we can address it on the
20 10th of January, but if you want to supplement what you've
21 already filed, Mr. Ghappour --

22 MR. GHAPPOUR: I was going to ask you because it
23 was superseded.

24 THE COURT: Well, okay then. Why don't you get any
25 supplemental motion papers in by the 20th of December; Mr.

1 Cole, any opposition no later than December 27.

2 MR. COLE: All right.

3 THE COURT: Mr. Ghappour, any reply no later than
4 January 3. We'll use the same briefing schedule we have for
5 motions in limine, and then we'll look at it on January 10.

6 MR. GHAPPOUR: Thank you.

7 THE COURT: Okay. Was there anything else,
8 Mr. Ghappour?

9 MR. GHAPPOUR: No, that was all. Thank you.

10 THE COURT: Well, thank you for bringing that up.
11 I was -- that was lost on me if there was an outstanding
12 motion that still hadn't been ruled upon. Okay. I think
13 we've heard from everyone then.

14 MS. FONTIER: Sorry. Your Honor, this is Alice
15 Fontier. I apologize for not being on the beginning of the
16 call. I don't have anything to add to what I've heard, but
17 if there were any particular questions that you had wanted me
18 to address, I just wanted to alert you that I am here now if
19 there's anything that I can offer.

20 THE COURT: No, I don't think there's anything
21 specific to you, Ms. Fontier. Mr. Dratel has been actively
22 advancing the concerns and I think speaking on behalf of the
23 entire defense community for matters of general concern. So
24 I have no further questions at this point for you. But, once
25 again, I want to thank everybody for your availability and

1 your continuing cooperation here. I think the next we'll be
2 seeing of you will be on January 10.

3 Please, if issues -- if any concerns or issues
4 arise for any of you that in any way jeopardize the schedule
5 we have at this point, including the trial date, please do
6 not hesitate to contact us just as soon as possible so that
7 we can arrange a telephonic conference, all right?

8 MR. DURKIN: Thank you, Judge.

9 MR. DRATEL: Will do, your Honor.

10 MS. FONTIER: Thank you, your Honor.

11 THE COURT: Thanks again, counsel.

12 (The proceedings were concluded.)
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Certificate of Reporter

I hereby certify that I am a duly appointed, qualified, and acting Official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated February 26, 2014 at San Diego, California.

/s/ Debra M. Henson (electronic)
Debra M. Henson
Official Court Reporter